Court, U.S.

93 - 290 FEB 9 1994

OFFICE OF THE CLERK

No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

LOS ANGELES LAND COMPANY,
Petitioner,

v.

BRUNSWICK CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

E. BARRETT PRETTYMAN, JR.*
THOMAS B. LEARY
JOHN G. ROBERTS, JR.
MICHELE S. HARRINGTON
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5685

ELIOT G. DISNER, P.C.
SHAPIRO, POSELL, ROSENFELD & CLOSE
2029 Century Park East
Suite 2600
Los Angeles, CA 90067
(310) 277-1818
Counsel for Petitioner

Of Counsel
C. RAYMOND MARVIN
1801 K Street, N.W.
Suite 201
Washington, D.C. 20006
(202) 659-5311

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

68 pp

QUESTIONS PRESENTED

1. May a court overturn a jury finding of unlawful monopolization on the ground that the defendant could not have monopoly power as a matter of law, despite findings under agreed upon instructions that (1) defendant had 100% of the relevant market, (2) there were barriers to entry, and (3) the defendant's anticompetitive acts succeeded in keeping others out of the market?

2. May a court overturn a jury finding of unlawful monopolization on the basis of a theoretical economic argument that even a defendant with a 100% share of a market with entry barriers cannot have monopoly power in that market without monopoly power in an upstream market?

PARTIES TO THE PROCEEDINGS

Petitioner Los Angeles Land Company was plaintiff-appellee below. Respondent Brunswick Corporation was defendant-appellant below.

RULE 29.1 STATEMENT

Petitioner has no parent, subsidiary, or affiliated corporations.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
1. Factual Background	2
2. Litigation in the District Court	5
3. The Ninth Circuit Opinion	6
REASONS FOR GRANTING THE PETITION	7
I. THE NINTH CIRCUIT DECISION EXACERBATES THE CONFUSION OVER THE SIGNIFICANCE OF POTENTIAL ENTRY IN ANTITRUST CASES	9
A. The Entry Issue Is Important for Antitrust Enforcement	9
B. The Lower Court Simply Assumed Entry Was Easy Because of a Narrow and Unrealistic Definition of Entry Barriers	13
1. The Requirement of Differential Barriers	15
2. The Requirement that Monopoly Power Be Proved in Two Different Markets	17

TABLE OF CONTENTS—Continued

Page

II. THE NINTH CIRCUIT DECISION ADDS TO THE EXISTING CONFUSION OVER THE APPROPRIATE ROLES OF JUDGE AND JURY IN ANTITRUST CASES 19

III. THE ISSUES ARE IMPORTANT AND RECURRING 22

CONCLUSION 23

APPENDIX

TABLE OF AUTHORITIES

CASES: Page

American Standard, Inc. v. *Bendix Corp.*, 487 F. Supp. 265 (W.D. Mo. 1980) 10
Automotive Products, PLC v. *Tilton Engineering, Inc.*, 1993 U.S. Dist. LEXIS 3752 (C.D. Cal. Jan. 21, 1993) 19
Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993) 9, 20, 21
Cargill, Inc. v. *Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) 16
Eastman Kodak Co. v. *Image Technical Services*, 112 S. Ct. 2072 (1992) 9, 18, 20,21
Energex Lighting Industries v. *North American Philips Lighting Corp.*, 765 F. Supp. 93 (S.D. N.Y. 1991) 10, 16
Federal Trade Commission v. *Rhinechem Corp.*, 459 F. Supp. 785 (N.D. Ill. 1978) 16
Greyhound Computer Corp. v. *International Business Machines Corp.*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) 10
Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*, 475 U.S. 574 (1986) 9, 20, 21
McCaw Personal Communications, Inc. v. *Pacific Telesis Group*, 645 F. Supp. 1166 (N.D. Cal. 1986) 11
Morgan, Strand, Wheeler & Biggs v. *Radiology, Ltd.*, 924 F.2d 1484 (9th Cir. 1991) 17
Nelson v. *Monroe Regional Medical Center*, 925 F.2d 1555 (7th Cir.), *cert. denied*, 112 S. Ct. 285 (1991) 7
Oahu Gas Service, Inc. v. *Pacific Resources, Inc.*, 838 F.2d 360 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988) 10, 15, 19
Ortho Diagnostic Systems v. *Abbott Laboratories*, 822 F. Supp. 145 (S.D.N.Y. 1993) 19
R.C. Bigelow, Inc. v. *Unilever N. V.*, 867 F.2d 102 (2d Cir.), *cert. denied*, 493 U.S. 815 (1989) 10
Reazin v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990) 15, 17

TABLE OF AUTHORITIES—Continued

	Page
Rebel Oil Co., Inc. v. *Atlantic Richfield Co.*, 133 F.R.D. 41 (D. Nev. 1990)	7-8
Southern Pacific Communications Co. v. *American Tel. & Tel. Co.*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985)	10, 17, 19
Union Leader Corp. v. *Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961)	14
United States v. *Baker Hughes Inc.*, 908 F.2d 981 (D.C. Cir. 1990)	7
United States v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377 (1956)	6, 10
United States v. *Grinnell Corp.*, 384 U.S. 563 (1966)	10
United States v. *Rockford Memorial Corp.*, 898 F.2d 1278 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990)	10
United States v. *Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990)	11
United States v. *Von's Grocery Co.*, 384 U.S. 270 (1966)	18
Valley Liquors, Inc. v. *Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987)	10

STATUTES:

Clayton Act, Section 7, 15 U.S.C. § 18	*passim*
Robinson-Patman Act, 15 U.S.C. § 13	12
Sherman Act, Section 2, 15 U.S.C. § 2	*passim*
15 U.S.C. § 15(a)	1
15 U.S.C. § 22	1
15 U.S.C. § 26	1
28 U.S.C. § 1332(a)	1
28 U.S.C. § 1337	1
28 U.S.C. § 1291	2
28 U.S.C. § 1254(1)	2

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES: Page

ABA Antitrust Section, *Antitrust Law Developments* (3d ed. 1992) 11, 13, 14
ABA Antitrust Section, *Sample Jury Instructions in Civil Antitrust Cases* (1990 ed.) 21
Phillip A. Areeda & Herbert Hovenkamp, *Antitrust Law* (1992 and 1993 Supps.) 17
Phillip A. Areeda & Donald F. Turner, 2 *Antitrust Law* (1978) 17
Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity Than Ever*, 62 Antitrust L.J. 327 (1994) 20
Department of Justice Antitrust Division and Federal Trade Commission, 1992 Horizontal Merger Guidelines, *reprinted in* 57 Fed. Reg. 41552-63 (Sept. 10, 1992) 12
Richard A. Givens, *Antitrust: An Economic Approach* (1989 Supp.) 16
Horizontal Merger Guidelines of the National Association of Attorneys General, *reprinted in* 64 Antitrust & Trade Regulation Reporter (Supp. Apr. 1, 1993) 12
Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of* Eastman Kodak Co. v. Image Technical Services *and a Modest Proposal for Limiting Them*, 52 Md. L. Rev. 336 (1993) 20
Leading Cases, 106 Harv. L. Rev. 163 (1992) 20
National Bowling Conference, *Profile of a Dynamic Market* (1991) 2
William G. Shepherd, *The Economics of Industrial Organization* (3d ed. 1990) 16
Neal R. Stoll and Shepard Goldfein, "Kodak": *A Barrier Against Naked Economic Theory*, N.Y. L.J., June 16, 1992 at 3 20

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-

LOS ANGELES LAND COMPANY,
Petitioner,

v.

BRUNSWICK CORPORATION,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Los Angeles Land Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 6 F.3d 1422 and reprinted in the Appendix ("App.") at 1a. The opinion of the district court is reported at 1991-2 Trade Cases (CCH) ¶ 69,661 and reprinted at App. 20a.

JURISDICTION

Petitioner filed suit in the United States District Court for the Central District of California on August 30, 1988 under 28 U.S.C. § 1332(a); 15 U.S.C. §§ 15(a), 22, and 26; and 28 U.S.C. § 1337. After the jury returned a

verdict in favor of petitioner, the respondent noticed an appeal on January 21, 1992 under 28 U.S.C. § 1291. The judgment of the court of appeals was entered on October 13, 1993. Petitioner's timely petition for rehearing was denied on November 12, 1993. App. 36a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it unlawful for any person to "monopolize . . . any part of the trade or commerce among the several States . . . ."

STATEMENT OF THE CASE

1. *Factual Background.*

The basic facts relevant to this petition were accepted as true by the court below and therefore are not at issue. Petitioner Los Angeles Land Company ("L.A. Land") is a real estate development company operating in southern California. It attempted to construct a bowling center, Twin Cities Bowl, in California's Antelope Valley. At the time, the only bowling center in the Valley, Sands Bowl, was owned and operated by respondent Brunswick Corporation ("Brunswick"). App. 2a.

Brunswick is a large, diversified company. One of its divisions owns and operates bowling centers across the nation, including Sands Bowl. Another of its divisions manufactures bowling equipment. *Id.*[1] During the period relevant here, Brunswick was the dominant manufacturer of bowling equipment purchased by new bowling centers in the United States, because Brunswick was "the only option available" for obtaining an integrated package of

---

[1] Bowling is a "massive participant sport . . . enjoyed by one out of every three men, women, and children in the country today." National Bowling Conference, *Profile of a Dynamic Market* (1991) at 4. In the United States, "82 million men, women, and children bowl an average of 9.2 times per year." *Id.*

bowling equipment. Reporter's Transcript of Proceedings ("RT") Vol. 2 at 238-240; Trial Exhibit ("Ex.") 51A.[2]

In March 1987, L.A. Land entered into a 99-year lease (with purchase option) on a parcel of land in the Antelope Valley on which it planned to construct the Twin Cities Bowl. L.A. Land obtained necessary permits and commissioned engineering and architectural plans for construction. RT Vol. 2 at 349-352, 391-392. L.A. Land placed an equipment order with Brunswick totaling over one million dollars. Ex. 1000A-2.

As the court of appeals recognized, it is difficult to procure financing for bowling equipment. App. 11a. For this reason, Brunswick had worked out an arrangement with Deutsche Credit Corporation ("Deutsche") whereby Deutsche agreed to extend credit to Brunswick's bowling equipment customers under certain conditions. For example, Deutsche required that loan applicants like L.A. Land submit their paperwork to *Brunswick*, rather than directly to Deutsche, that Brunswick forward all loan materials to Deutsche, and that Brunswick send Deutsche a market survey regarding the prospective bowling center for which the equipment was ordered. *Id.* at 3a. When L.A. Land ordered equipment from Brunswick, it sought equipment financing from Deutsche. *Id.*

Deutsche was one of the very few lenders, if not the only lender, that would even consider extending credit for bowling equipment purchases in the relevant market during the relevant period. RT Vol. 2 at 390-391; Vol. 3 at 457-459; Vol. 4-B at 719-721; McMaster Deposition ("Dep.") at 135-137 (RT Vol. 5 at 824). Its special arrangement with Brunswick had the effect of giving

---

[2] The only other source of even an arguably complete integrated package of bowling equipment was American Machine Foundry ("AMF"), and during the period relevant to the present case, AMF's continued viability was in doubt. The industry was uncertain whether AMF would be able to deliver products in a timely manner, provide service and spare parts, and honor its warranties. RT Vol. 2 at 242-243, 368-369; Vol. 7 at 989-991.

Brunswick veto power—as a gatekeeper—over the most likely financing source for the purchase of bowling equipment.

Despite the apparent willingness of its bowling products division to sell L.A. Land the equipment it needed to operate the Twin Cities Bowl, Brunswick as a whole was really working behind the scenes to prevent L.A. Land's entry into the market. The jury found, and the Ninth Circuit accepted, that Brunswick committed "anticompetitive" acts to keep L.A. Land out of the market. App. 9a-10a, 11a, 27a. Specifically: (1) Brunswick convinced L.A. Land's construction company not to build the Twin Cities Bowl (*id.* at 10a); (2) Brunswick delayed the Twin Cities Bowl project by failing to transmit L.A. Land's financial information to Deutsche for an unduly long period (*id.*; RT Vol. 3 at 438-442), thus securing a headstart for its own new bowling center in the Antelope Valley; and (3) Brunswick prevented L.A. Land from obtaining bowling equipment financing from Deutsche and from any other potential lender by preparing a misleading survey which stated that there was not enough potential business in the market for the Twin Cities Bowl if Brunswick also decided to build there. App. 10a; McMaster Dep. at 18, 75-76 (RT Vol. 5 at 824); Ex. 25; Ex. 45.

When Deutsche rejected L.A. Land's delayed loan application, after receiving Brunswick's misleading market survey, L.A. Land attempted to secure financing from numerous other lenders, but to no avail. As noted, very few lenders would finance the purchase of bowling equipment in the first place, and Brunswick's market survey and Deutsche's prior rejection scared off any who might have. RT Vol. 2 at 390-391; Vol. 3 at 457-459; Vol. 4-B at 719-721; McMaster Dep. at 137 (RT Vol. 5 at 824); Ex. 25 at 2.

While delaying and ultimately preventing L.A. Land's entry, Brunswick expedited the construction of its own additional bowling center in the relevant market. Bruns-

wick's market survey had represented that there was sufficient population for only one additional bowling center in the market. Ex. 45. Whether this representation was technically true or deliberately misleading when originally made in the market survey, it became a self-fulfilling prophecy because no lender would extend credit to an entity in the face of Brunswick's adverse survey. McMaster Dep. at 18, 75-76 (RT Vol. 5 at 824); Ex. 25 at 2. Accordingly, Brunswick succeeded not only in keeping L.A. Land out of the market, but also in ensuring for the foreseeable future that no one else could enter the market and threaten its 100% market share there, precisely as it had intended. Ex. 433. To this day, Brunswick owns the only two bowling centers in the relevant market.

2. *Litigation in the District Court.*

L.A. Land brought suit in the United States District Court for the Central District of California, charging Brunswick, *inter alia,* with monopolizing retail bowling services in the relevant market in violation of Section 2 of the Sherman Act and with intentional interference with prospective economic advantage. After a nearly six week trial, the jury found that Brunswick had violated Section 2 of the Sherman Act. Specifically, the jury concluded—under instructions that were not objected to by Brunswick and that therefore must be presumed to be correct—that Brunswick possessed monopoly power in the relevant market, willfully maintained that power through restrictive or exclusionary conduct, affected interstate commerce, and injured L.A. Land's business interests as a result. App. 27a. The jury also found that Brunswick had committed a number of torts in the process. *Id.* at 28a-29a, 31a-32a. Judge Pfaelzer denied post-trial motions on the federal claim [3] and entered an amended judgment award-

[3] After the jury's verdict, Brunswick moved for judgment notwithstanding the verdict. The district court granted the motion as to the state law claims for breach of contract and wrongful denial of contract, but denied the motion as to the antitrust and intentional interference claims. App. 20a-21a.

ing L.A. Land the trebled sum of $15,168,000 in damages on its antitrust claim or, alternatively, $5,056,000 on its claim for intentional interference, and costs and attorneys' fees. *Id.* at 23a-24a. Brunswick appealed.

3. ***The Ninth Circuit Opinion.***

The Ninth Circuit assumed, as it was required to, that Brunswick controlled 100% of the relevant market (App. 2a, 6a), that Brunswick took anticompetitive actions to keep L.A. Land out of the relevant market (*id.* at 10a), and that "the jury was entitled to find that bowling equipment financing is hard to obtain." *Id.* at 11a. Nevertheless, the appellate court reversed the jury's verdict on the ground that Brunswick, as a matter of law, could not possess monopoly power. *Id.* at 6a, 19a.

The court found that "the record simply does not support a finding that Brunswick had power to control prices or exclude competition," the test for monopoly power under this Court's controlling case of *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956). App. 6a. The court below justified this conclusion on the ground that barriers to entry into the relevant market did not exist.

Specifically, the Ninth Circuit found that the "jury could not rationally construe" the fact that bowling equipment financing is difficult to obtain as a barrier to entry because "there was no evidence that the lenders who were willing to finance bowling equipment imposed higher financing costs on new entrants than on established firms." *Id.* at 11a. "The fact that many lenders do not understand the bowling market does not mean that the capital costs for new entrants and incumbents in the market differ, or that it is any more difficult for new entrants to obtain financing than incumbents." *Id.* Thus, the Ninth Circuit concluded that a barrier to entry does not exist unless it imposes higher costs on new entrants than on incumbents.

In addition, the court below held that "the district court should not have sent" the case to the jury because "a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market." *Id.* at 12a-13a. In essence, the court ruled that the plaintiff was required to prove monopoly power in at least two markets in order to support a monopolization claim in one of them.

REASONS FOR GRANTING THE PETITION

1. The concept of entry barriers has taken center stage in antitrust litigation in recent years. If barriers are low, the existence of potential entrants can discipline incumbent firms and prevent even entities with high market shares from exercising monopoly power and setting prices above competitive levels. Accordingly, proof of low barriers can defeat the normal inferences of monopoly power, or threatened monopoly power, that can be drawn from high market shares in Sherman Act monopolization cases and Clayton Act Section 7 merger cases.

Unfortunately, the increasing importance of entry barriers in antitrust jurisprudence has been accompanied by increasing confusion about what constitutes entry barriers and who bears the burden of proving or disproving them, especially in cases like the present one where a defendant possesses an overwhelming percentage of the market.[4]

---

[4] Authority is split on whether antitrust plaintiffs or defendants bear the burden of introducing evidence on barriers to entry. *Cf. United States* v. *Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990) (when the government introduces evidence of defendants' high market shares in Section 7 (15 U.S.C. § 18) cases, burden shifts to defendants to introduce evidence, such as low entry barriers, to rebut presumption of unlawfulness), *with Nelson* v. *Monroe Regional Medical Center*, 925 F.2d 1555, 1573 (7th Cir.), *cert. denied*, 112 S. Ct. 285 (1991) (Pell, J., concurring in part and dissenting in part) (in Section 2 cases, the burden is on plaintiff to show the existence of barriers to entry); *Rebel Oil Co.* v. *At-*

This case presents the Court with a unique opportunity to clear up the confusion surrounding this increasingly important antitrust concept for a number of reasons. First, there is no complex factual dispute here about whether or not entry into the relevant market is difficult. The Ninth Circuit assumed entry was difficult because capital was hard to obtain and, in fact, Brunswick's exploitation of this situation successfully preserved its total monopoly.

Second, the Ninth Circuit wholly ignored evidence, which the jury could credit, that demonstrates classic structural barriers to entry. As demonstrated below, Brunswick claimed, and lenders believed, that the relevant market was saturated once Brunswick built its second bowling center there. Consequently, it was impossible for any potential newcomers to secure equipment loans to enter this particular market. The Ninth Circuit did not even consider these facts when it concluded that no jury could reasonably find entry barriers in the relevant market.

Third, the Ninth Circuit's conclusion that difficulty in obtaining financing is not a barrier in the legal sense—because it does not impose differential burdens on incumbents and new entrants—is plainly wrong and undercuts the purpose for examining entry barriers in the first place. The issue is whether barriers are low enough for potential new entrants effectively to dissuade the incumbent monopolist from charging supracompetitive prices. It is irrelevant whether or not the incumbent itself faced the same barriers in the past when it entered the market.

Finally, the Ninth Circuit's implicit finding that there are no effective barriers to entry unless the monopolist also monopolizes the upstream supplier market effectively

---

lantic Richfield Co., 133 F.R.D. 41, 44-45 (D. Nev. 1990) (same). This dispute is not material to the present case, however, because there was credible evidence of entry barriers since the jury "was entitled to find that bowling equipment financing is hard to obtain." App. 11a.

makes it impossible for a plaintiff ever to prove monopoly power. If the court's logic were accepted, the plaintiff could not prove monopoly power in the first upstream market without proving monopoly power in the market for supplies to suppliers, and so on up the line. A plaintiff's or prosecutor's burden could become virtually insurmountable in monopolization or merger cases.

2. This case also presents the Court with the opportunity to clarify the appropriate roles of judge and jury in antitrust disputes. Confusion now exists because of the potentially conflicting instructions that lower courts can glean from language in three recent cases from this Court —*Eastman Kodak Co.* v. *Image Technical Services*, 112 S. Ct. 2072 (1992), *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 113 S. Ct. 2578 (1993). *Kodak* instructed that juries should be permitted to determine whether monopoly power is present on the basis of specific facts, rather than abstract economic theories. *Matsushita* and *Brooke* directed that certain antitrust claims should be dismissed as a matter of law if they made no economic sense. This case adds to the confusion surrounding these seemingly conflicting instructions.

I. THE NINTH CIRCUIT DECISION EXACERBATES THE CONFUSION OVER THE SIGNIFICANCE OF POTENTIAL ENTRY IN ANTITRUST CASES.

A. The Entry Issue Is Important for Antitrust Enforcement.

The unlawful monopolization offense under Section 2 of the Sherman Act requires proof of the following elements: (1) defendant's possession of monopoly power in the relevant market; (2) defendant's willful acquisition or maintenance of that power; and (3) the existence of anti-

trust injury. App. 5a. Only the first element, Brunswick's possession of monopoly power in the relevant market, was at issue in the Ninth Circuit's decision.

Monopoly power is " 'the power to control prices or exclude competition.' " *Id.* at 6a (citing *E.I. duPont de Nemours & Co.*, 351 U.S. at 391). This Court and others have traditionally used market share as a proxy for monopoly power and have inferred monopoly power from a "predominant share of the market." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 571 (1966).[5] This inference of monopoly power can, however, sometimes be rebutted by a showing of low entry barriers or other significant restraints on a purported monopolist's power in the marketplace. *See, e.g., Oahu Gas Service, Inc.* v. *Pacific Resources, Inc.*, 838 F.2d 360, 366-367 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988).[6] This is be-

---

[5] *See, e.g., Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 822 F.2d 656, 666 (7th Cir.), *cert. denied*, 484 U.S. 977 (1987) ("Market power is 'normally inferred from the possession of a substantial percentage of the sales in a market' ") (citation omitted); *Southern Pacific Communications Co.* v. *American Tel. & Tel. Co.*, 740 F.2d 980, 1000 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985) ("Monopoly power is . . . ordinarily inferred from a predominant share of the market"); *Greyhound Computer Corp.* v. *International Business Machines Corp.*, 559 F.2d 488, 496 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) (" 'size is of course an earmark of monopoly power' ") (citation omitted); *Energex Lighting Industries* v. *North American Philips Lighting Corp.*, 765 F. Supp. 93, 101 (S.D.N.Y. 1991) ("The strongest evidence of market power is the market share which defendant possesses of the relevant market"); *American Standard, Inc.* v. *Bendix Corp.*, 487 F. Supp. 265, 269 (W.D. Mo. 1980) ("The existence of monopoly power may be inferred from the relative dominance of the particular firm in the particular industry"). *Cf. R.C. Bigelow, Inc.* v. *Unilever* N. V., 867 F.2d 102, 108 (2d Cir.), *cert. denied*, 493 U.S. 815 (1989) (84% of market is *prima facie* evidence of monopoly power).

[6] *Cf. United States* v. *Rockford Memorial Corp.*, 898 F.2d 1278, 1285-86 (7th Cir.), *cert. denied*, 498 U.S. 920 (1990) ("The defend-

cause "where entry is extremely easy . . . the threat of such entry should prevent [the alleged monopolist] from raising prices to monopoly levels or the fact of such entry should make any exercise of monopoly power short lived." ABA Antitrust Section, *Antitrust Law Developments* (3d ed. 1992) (hereafter "*Antitrust Law Devs.*") at 217.

United States v. *Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990), is perhaps the most significant recent case holding that evidence of a high market share can be rebutted by other factors, and it was accepted as controlling by the court below. But *Syufy* provides no support for the lower court's decision. The *Syufy* court held that a fact finder is *not required* to find monopoly power simply because market shares are high in a market where "there are *no* barriers to entry." *Id.* at 661 (emphasis added). *Syufy* also involved a market where the supposed victims of defendant's monopoly had strong bargaining power of their own, and affirmatively disclaimed any harm. *Syufy*, 903 F.2d at 669-670.

Here, the court accepted—as it had to—that Brunswick possessed 100% of a relevant market in which entry was difficult and that Brunswick's anticompetitive actions successfully preserved its monopoly. It goes beyond *Syufy* and other existing case law even to *permit* a fact finder to avoid a finding of monopoly power in this situation, but the court below did something even more drastic. It held that the jury was *prohibited* from finding monopoly power as a matter of law. The court's extraordinary hold-

---

ants' immense shares in a reasonably defined market create a presumption of illegality . . . . [O]nce the government showed that the merger would create a firm having a market share approaching, perhaps exceeding, a common threshold of monoply power—two-thirds [citation omitted]—it behooved the defendants to present evidence that the normal inference to be drawn from such a market share would mislead"); *McCaw Personal Communications, Inc.* v. *Pacific Telesis Group*, 645 F. Supp. 1166, 1173-74 (N.D. Cal. 1986) (the combined market shares of defendants render the acquisition presumptively illegal but the illegality may be rebutted by "[t]he existence of low barriers to entry").

ing resulted from its misunderstanding of theoretical economic concepts and entry barriers. This misuse of entry analysis to overturn a jury verdict does not merely affect an esoteric corner of antitrust law; it cuts out the heart of antitrust enforcement.

The reason is that entry arguments, if uncritically accepted, can be used to defeat any antitrust claim. They could make all antitrust laws unnecessary, because it always can be argued that new entry into existing markets, or the development of new substitute products, will sooner or later erode the power of any monopoly or of any combination. Uncritical acceptance of entry arguments would defeat a monopolization claim, as in this case; it would also defeat attempted monopolization claims because a plaintiff could not prove the requisite likelihood that anticompetitive conduct would ever succeed; it would defeat claims under the Robinson-Patman Act (15 U.S.C. § 13) because no one could prove a potential for competitive harm; and it would even undercut the rationale for a *per se* prohibition of price fixing, because entry could also theoretically discipline an illegal conspiracy. This extreme view that entry, however defined, ultimately cures everything has never been accepted, as a matter of law or policy, and yet it is the basis of the decision below.

Recent experience with administration of the antimerger provisions of the Clayton Act demonstrates how loose entry analysis can swallow substantive antitrust law. In fact, concerns about uncritical acceptance of entry arguments prompted the federal antitrust agencies to treat the subject in detail in their new Merger Guidelines. Department of Justice Antitrust Division and Federal Trade Commission, 1992 Horizontal Merger Guidelines, *reprinted in* 57 Fed. Reg. 41552-63 (Sept. 10, 1992). *Cf.* Horizontal Merger Guidelines of the National Association of Attorneys General, *reprinted in* 64 Antitrust & Trade Regulation Reporter (Supp. Apr. 1, 1993) at § 5. Specifically, the Government no longer concludes that normal market share presumptions can be overcome by

evidence that potential entry *could* occur. Instead, the Government examines whether entry actually *would* occur and whether it would deter supracompetitive pricing. Commentary to 1992 Merger Guidelines, *Antitrust Law Devs.* at 1361-62. The analysis of entry in the opinion below is directly contrary to this policy.

This Court has never spoken on the appropriate definition of entry barriers. To promote consistency among and within the circuits, to foster antitrust enforcement by making results more predictable, and to streamline costly and complex antitrust discovery, it is crucial that the Court provide guidance about the appropriate contours of the entry barrier concept. The Ninth Circuit's flawed approach to entry barriers provides an ideal opportunity for the Court to do so, because the relevant facts are undisputed, and the Court of Appeals assumed those facts to be true for purposes of its decision.

In summary, the approach of the court below—if followed—will seriously cripple antitrust enforcement. It is hard to imagine a stronger showing of monopoly power than the one made in this case. The defendant had a total monopoly and was actually able to exploit existing barriers to bar entry by a likely competitor now and for the foreseeable future. If mere speculation about possible entry defeats a jury verdict in this situation, few if any claims are likely to survive, contrary to the long-standing Congressional policy embodied in the Sherman Act.

B. The Lower Court Simply Assumed Entry Was Easy Because of a Narrow and Unrealistic Definition of Entry Barriers.

Along with Brunswick's conceded 100% market share, there was clear proof of entry barriers in this case. The Brunswick market survey demanded by lenders stated that there was room for only one additional 40-lane bowling center in the relevant market. While L.A. Land demonstrated, and the court of appeals assumed, that this survey was "false or misleading," it makes no differ-

ence for the purpose of dealing with barriers to entry whether the survey was false or not. The survey became a self-fulfilling prophecy because no lender would extend credit to equip a new bowling center in an area that, according to a Brunswick survey, could not support that bowling center. The result was what is known as a "thin" market—a market in which only limited entry can be absorbed. *See, e.g., Union Leader Corp.* v. *Newspapers of New England Inc.*, 284 F.2d 582, 583-584 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961). This in itself constituted an entry barrier.[7] *Antitrust Law Devs.* at 217.

Thus, when Brunswick engaged in anticompetitive behavior, it did so in a thin market—a market in which barriers to entry *already* existed. And it therefore did so illegally. Even more important, the entry barrier was not one that affected L.A. Lane alone. *Every* putative builder of a bowling center was faced with the same forecast in the same survey in the same thin market. Indeed, the market survey did not even mention L.A. Land. The harm was to competition generally, and not just to a single competitor.

Other facts in the record likewise suggested the existence of entry barriers. As the court below acknowledged, "[t]here is some evidence in the record that lenders generally have trepidations about financing bowling equipment purchases" and "the jury was entitled to find that bowling equipment financing is hard to obtain." App. 11a. The Ninth Circuit held as a matter of law, however, that these facts could not constitute a barrier to entry because (1) there was no showing that it was harder (or more expensive) for L.A. Land to get money than it

[7] The court conceded that "[e]conomies of scale" could be a barrier to entry. App. 11a at n.4. However, the court never considered whether the thin market in the Antelope Valley—created by Brunswick's market survey, if it did not already exist—had exactly the same preclusive effect as scale economies would have had.

was for Brunswick (*id.*), and (2) Brunswick could not inhibit entry into the bowling center market, according to the court, unless it had monopoly power in the upstream bowling equipment market. *Id.* at 12a-14a. Neither of these grounds withstands scrutiny.

1. *The Requirement of Differential Barriers.*

There was, in fact, evidence that would support the jury's verdict even under this overly narrow standard for entry barriers. Brunswick's unique arrangement with one of the very few sources of bowling equipment financing—Deutsche—created a clear strategic advantage. App. 3a. In addition, this arrangement effectively gave the gatekeeper, Brunswick, veto power in any dealings between L.A. Land and the most likely, if not only, source of equipment financing. In light of Brunswick's "false or misleading" market survey for the Antelope Valley, timing was critical. Brunswick's delay in processing and transmitting L.A. Land's loan application enabled Brunswick to occupy the market first. *Id.* at 3a-4a. The Ninth Circuit's failure to consider these decisive events is a prime example of how error arises in antitrust litigation when abstract economic theories are allowed to trump specific facts.[8]

---

[8] Moreover, other facts in the record also signaled the existence of entry barriers. For example, the record established that by 1988 all participants in the relevant market, except for Brunswick, had exited, and no one had successfully entered the market for many years. App. 7a. There is ample authority holding that the jury could rely on these facts alone to show the existence of entry barriers and Brunswick's monopoly power. *See, e.g., Reazin* v. *Blue Cross & Blue Shield of Kansas, Inc.*, 899 F.2d 951, 971 (10th Cir.), *cert. denied*, 497 U.S. 1005 (1990) ("While it is true that only capital and licensing were necessary to initially enter the health care financing market, the fact remains that no other entrant remotely approached Blue Cross' domination of the market. That evidence cuts against the argument that entry barriers were insubstantial"); *Oahu Gas Service, Inc.*, 838 F.2d at 366-367 (the failure of other firms to enter the market could support an inference that defendant

More importantly, however, the Ninth Circuit's requirement that a differential entry burden be shown is erroneous as a matter of law. This requirement ignores the basic rationale for consideration of entry barriers in the first place. The underlying concern in cases where monopoly power is at issue is whether or not an existing monopolist's ability to exploit its position will be disciplined by the potential for new entry. The disciplining effect of new entry will obviously be less potent if there are barriers that make it difficult for new competitors to get into the business. For this purpose, it is entirely irrelevant that the incumbent might also have had to overcome barriers in the past. The incumbent still has monopoly power (*i.e.*, power over prices) if there are entry impediments to newcomers.[9] *Cf. Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 120 n.15 (1986) ("In evaluating entry barriers in the context of a predatory pricing claim, however, a court should focus on whether significant entry barriers would exist *after* the merged firm has eliminated some of its rivals . . .") (emphasis in original).

---

had the power to exclude competitors or control price without much detailed inquiry); *Federal Trade Commission* v. *Rhinechem Corp.*, 459 F. Supp. 785, 789-790 (N.D. Ill. 1978) ("The testimony is unanimous regarding the barriers to entry in the organic pigments industry. Not one firm has made a successful *de novo* entry in this market in the last twenty years"); *Antitrust Law Devs.* at 218. *Cf. Energex Lighting Industries*, 765 F. Supp. at 97 (entry of new firms indicates that the market was not saturated and barriers to entry did not exist).

[9] Ironically, the Ninth Circuit earlier rejected evidence of Brunswick's " 'systematic campaign to exclude competitors' " as a demonstration of entry barriers precisely because "anticompetitive conduct by one firm against another is not an 'entry barrier'." App. 11a. Once again the court misconstrued and misapplied the entry barrier concept. While barriers need not be erected by the monopolist to qualify as entry barriers, they certainly may be. *See, e.g.*, William G. Shepherd, *The Economics of Industrial Organization* (3d ed. 1990) at 273-274; Richard A. Givens, *Antitrust: An Economic Approach* § 3-10 at 13 (1989 Supp.).

The Ninth Circuit's chosen definition of entry barriers is far too restrictive.[10] "*Any* market condition that makes entry more costly or time-consuming and thus reduces the effectiveness of potential competition as a constraint on the pricing behavior of the dominant firm should be considered a barrier to entry . . . ." *Southern Pacific Communications*, 740 F.2d at 1001 (emphasis supplied). *See also Reazin*, 899 F.2d at 968. These difficulties "deter entry while permitting incumbent firms to earn monopoly returns." Phillip A. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 409 at 525 (1993 Supp.)[11]

2. *The Requirement That Monoply Power Be Proved in Two Different Markets.*

The Ninth Circuit elevated an economic "presumption" —namely, that a defendant cannot possess monopoly power in a downstream market unless it also possesses monopoly power in an upstream market (App. 12a-14a)—over the jury's specific findings of fact. Although the lower court does not expressly link this presumption to the issue of entry barriers, it implicitly flows out of the same con-

---

[10] The Ninth Circuit's "support" for its restrictive application of the entry concept is inapposite. It cited one case which did not even mention or allude to the restrictive application—*Morgan, Strand, Wheeler & Biggs* v. *Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991)—and two isolated statements by Professors Areeda and Turner in which higher entry costs for new entrants than incumbents were termed entry barriers. App. 11a-12a & n.4 (citing 2 Areeda & Turner, *Antitrust Law* ¶ 409b and ¶ 409e (1978)). L.A. Land has no quarrel with this latter proposition. Just because differential entry costs may constitute entry barriers, however, does not mean that they are the only costs or conditions that ever do.

[11] The Ninth Circuit did acknowledge early in its decision that an entry barrier could be " 'factors in the market that deter entry while permitting incumbent firms to earn monopoly returns'." App. 11a (citing Areeda & Hovenkamp, *Antitrust Law* ¶ 409 at 509-510 (1992 Supp.)). Inexplicably, however, it ignored this definition when it evaluated whether the difficulty of obtaining financing could constitute a barrier to entry.

ceptual error by the court. The presumption is also contrary to existing law and elementary logic.[12]

Existing law does not require a plaintiff who claims monopoly in one market to prove that the defendant also monopolizes an upstream or affiliated market. In fact, this Court's recent *Kodak* case is squarely to the contrary, as are all other cases which find monopoly power in a retail market without proof of integration into and monopoly power in an upstream market. *Cf. United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966) (merger of two retail grocery chains violated Section 7 without concern for who made and sold the food to the chains).

The requirement is also logically unsound. If monopoly power in bowling centers cannot exist without monopoly power in bowling equipment, then, by the same token, monopoly power in bowling equipment cannot exist without monopoly power in the component parts of bowling equipment. By extension of the Ninth Circuit's logic, a Section 2 plaintiff presumably could never prevail unless it proved that defendant possessed monopoly power over a chain of upstream markets. Monopolists who participate only in downstream or retail markets would then never be subject to Section 2's prohibition against unlawful monopolization, or indeed to any other antitrust laws which require proof of competitive impact.

The apparent source of the Ninth Circuit's erroneous presumption is once again its misunderstanding of the

---

[12] The court's invocation of its "presumption" is also unfair on process grounds. The lower court stated that L.A. Land "specifically eschewed a supply monopoly theory; consequently it was precluded from obtaining discovery on that theory." App. 12a. On the contrary, Brunswick moved early on to *prevent* discovery about its market power in the equipment market, claiming it was irrelevant, and the district court, against L.A. Land's objection, granted Brunswick's motion. RT Vol. 12 at 1843-45. It is patently unfair to fault L.A. Land for not presenting evidence on Brunswick's market power in the upstream market when the district court, at Brunswick's urging, had held that such evidence was not discoverable.

entry barrier concept. The court overturned a well-instructed jury's finding of monopoly power and concluded that Brunswick could not possess such power in the relevant market unless it also possessed it in an upstream market—and could, therefore, exclude competition, or erect entry barriers, itself. The law, however, does not confine entry barriers to barriers actually erected by the monopolist.[13] The Ninth Circuit's mistaken reasoning is yet another example of the confusion which currently clouds application of the entry barrier concept in antitrust law.

II. THE NINTH CIRCUIT DECISION ADDS TO THE EXISTING CONFUSION OVER THE APPROPRIATE ROLES OF JUDGE AND JURY IN ANTITRUST CASES.

As the Ninth Circuit's decision demonstrates, courts continue to be confused about the appropriate roles of judges and juries in antitrust litigation. It is important to clear up this confusion because antitrust litigation consumes significant public and private resources. There is waste and injustice both when jury verdicts approved by district courts are improperly overturned (as here) and

---

[13] *See, e.g., Oahu Gas Service, Inc.*, 838 F.2d at 366-367 (defendant could lack the power to exclude competitors, but external factors could still preclude entry into the market); *Southern Pacific Communications Co.*, 740 F.2d at 1001 ("The defendant's innocence or blameworthiness, however, has absolutely nothing to do with whether a condition constitutes a barrier to entry"); *Automotive Products, PLC* v. *Tilton Engineering, Inc.*, 1993 U.S. Dist. LEXIS 3752, at *20 (C.D. Cal Jan. 21, 1993) (there are two kinds of barriers to entry—"(1) structural barriers, such as where the entry cost of entering a particular market is very high . . .; and (2) barriers created by the monopolist himself to keep out competitors"); *Ortho Diagnostic Systems* v. *Abbott Laboratories*, 822 F. Supp. 145, 148 (S.D.N.Y. 1993) (description of entry barriers includes external factors such as "high costs of research and development, and the expense of acquiring patents, maintaining a large sales and technical support staff and obtaining FDA approvals").

when cases are improperly submitted to the jury in the first place.

The confusion arises because the language in *Kodak*, 112 S. Ct. 2072, on the one hand, and *Matsushita*, 475 U.S. 574, and *Brooke*, 113 S. Ct. 2578, on the other, seems to send conflicting signals to the lower courts. *See, e.g., Leading Cases*, 106 Harv. L. Rev. 163, 328 (1992) (judicial tolerance of summary judgment in antitrust cases and willingness to rely on theoretical antitrust propositions "suffered unexpected reversals" in *Kodak*, and lower courts are left "with little guidance and American industries with much uncertainty"); Stephen Calkins, *The October 1992 Supreme Court Term and Antitrust: More Objectivity Than Ever*, 62 Antitrust L. J. 327, 393-394 (1994); Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of* Eastman Kodak Co. v. Image Technical Services *and a Modest Proposal for Limiting Them*, 52 Md. L. Rev. 336, 360-361 (1993); Neal R. Stoll and Shepard Goldfein, "Kodak": *A Barrier Against Naked Economic Theory*, N.Y. L.J., June 16, 1992, at 3, 7. *Kodak* instructs courts not to elevate economic theory over fact, and to permit fact finders to determine the presence of monopoly power based on the " 'particular facts disclosed by the record.' " *Kodak*, 112 S. Ct. at 2082 (citation omitted). *Matsushita* and *Brooke*, on the other hand, instruct courts to dismiss as a matter of law certain antitrust claims which make no economic sense.

Properly understood and read in context, *Kodak*, *Matsushita*, and *Brooke* are not inconsistent. *Matsushita* and *Brooke* did not rely on the kind of esoteric economic theory condemned by *Kodak*. Instead, they rested on the common-sense observation that defendants do not engage in *predatory pricing* unless there is a reasonable likelihood that short-term losses will be recouped through long-term gains. If there is no reasonable likelihood of that happening—as in *Matsushita* and *Brooke*—a plaintiff's verdict cannot stand as a matter of law.

Kodak and this case are different. They are not predatory pricing cases; they involve other types of conduct. A finding for defendants as a matter of law in this situation, as occurred below, requires a court to take judicial notice of controversial economic theories not grounded in particular facts or simple common sense. *Kodak* condemned the elevation of such theories over actual facts. The Ninth Circuit nevertheless did precisely that.

Specifically, the Ninth Circuit held that L.A. Land's case should not have gone to the jury because "a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market." App. 13a. The Ninth Circuit elevated this legal "presumption" over a well-instructed jury's express finding that Brunswick did in fact possess monopoly power in the relevant market.[14] The lower court also misapplied economic theory when it concluded that there could not be any barriers to entry unless potential entrants faced higher hurdles than the incumbent monopolist.

The Ninth Circuit's erroneous opinion presents this Court with a timely and straightforward opportunity to rectify existing confusion over the seemingly conflicting signals in *Kodak*, *Matsushita*, and *Brooke*, about the appropriate roles of judge and jury in antitrust litigation.

---

[14] It is significant that Brunswick never objected to the jury instructions on monopoly power. App. 7a at n.2. Indeed, the district court's relevant monopoly power instructions largely mirrored the sample antitrust jury instructions published by the Antitrust Law Section of the American Bar Association. *See* Section of Antitrust Law, American Bar Association, *Sample Jury Instructions in Civil Antitrust Cases* (1990 ed.) at C-4—C-5, C-14—C-19.

III. THE ISSUES ARE IMPORTANT AND RECURRING.

The two questions presented for review in this case have enormous impact for antitrust law and for the future of competition. The Ninth Circuit has overturned a jury verdict and held that a company *cannot* be liable for monopolization, even though the company possesses 100% of the relevant market, will continue to do so for the foreseeable future, and misuses its power to defeat entry in a market where barriers to entry are already high. This result was not based on erroneous jury instructions; the instructions in this case were agreed to by the defendant.

Instead, the lower court took judicial notice that it is not possible to monopolize the bowling market because entry is easy. The court simply assumed entry is easy because of its mistaken notion that a plaintiff must prove that entry barriers impose differential burdens on potential new entrants and incumbents, and because of its mistaken notion that a plaintiff must prove monopoly power in an entirely different, upstream market.

Such a ruling, if allowed to stand, could have a devastating effect on existing public and private incentives to enforce the antitrust laws. As indicated above, it would have an immediate effect on monopolization and attempted monopolization cases, and would also undermine enforcement of the anti-merger law and perhaps even the *per se* strictures against horizontal conspiracies.

CONCLUSION

For each and all of the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
THOMAS B. LEARY
JOHN G. ROBERTS, JR.
MICHELE S. HARRINGTON
HOGAN & HARTSON, L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5685

ELIOT G. DISNER, P.C.
SHAPIRO, POSELL, ROSENFELD & CLOSE
2029 Century Park East
Suite 2600
Los Angeles, CA 90067
(310) 277-1818
Counsel for Petitioner

Of Counsel
C. RAYMOND MARVIN
1801 K Street, N.W.
Suite 201
Washington, D.C. 20006
(202) 659-5311

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 92-55134

LOS ANGELES LAND CO.; SIERRA PALM PARTNERS; WEST LANES INC.,
Plaintiff-Appellees,

v.

BRUNSWICK CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California

Argued and Submitted July 12, 1993

Decided Oct. 13, 1993

Stephen M. Shapiro, Mayer, Brown & Platt, Washington, DC, for defendant-appellant.

Eliot G. Disner, Shapiro, Posell & Close, Los Angeles, CA, for plaintiff-appellee.

Before: Floyd R. GIBSON,* HALL and KLEINFELD, Circuit Judges.

---

* The Honorable Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, sitting by designation.

CYNTHIA HOLCOMB HALL, Circuit Judge:

Brunswick Corporation ("Brunswick") appeals from the district court's judgment following a jury verdict awarding to Los Angeles Land Company ("L.A. Land") $15,168,000 under section 2 of the Sherman Act, and, alternatively, one-third that amount under California common law governing tortious interference with prospective economic advantage. Brunswick contends that the district court should have granted its motions for directed verdict and judgment notwithstanding the verdict because L.A. Land failed to prove violations of federal antitrust law or state tort law. This case centers on the competing efforts of the two parties to build a bowling center in Palmdale in the Antelope Valley (a portion of Los Angeles County) at a time when Brunswick owned the only existing center in the Valley.

The district court had jurisdiction over the federal antitrust claims under 15 U.S.C. §§ 15, 26, and pendent jurisdiction over the state law claims. We have jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. We reverse.

I. FACTS AND PROCEEDINGS BELOW

Brunswick wholly owns two subsidiaries—one which manufactures and sells bowling equipment, and another which owns and operates bowling centers in the United States and abroad. One of the centers under the control of the latter subsidiary is the Sands Bowl in the Antelope Valley. In spring of 1988, the Sands Bowl was the only bowling center in the Antelope Valley, an area with a rapidly expanding population.

L.A. Land is a real estate development company which, among various other enterprises, owns and operates three bowling centers in Southern California. In 1987, L.A. Land set in motion a plan to build a bowling center in the Antelope Valley. In April 1988, it sent an order for equipment to Brunswick, with specified condi-

tions. About that time, Brunswick itself developed an interest in opening a new bowling center in the Antelope Valley.

In 1986, Brunswick had formed an agreement with Deutsche Credit Corporation ("DCC") under which Brunswick helped its customers to obtain equipment financing from DCC by guaranteeing through a contingent repurchase arrangement that Brunswick rather than DCC would bear most of the risk of borrower default. The agreement required Brunswick to assume contingent liability for the loan, gather information for the loan application package and transmit the package to DCC, and prepare a market survey to help DCC assess the viability of any new bowling center. When L.A. Land sought to purchase equipment from Brunswick for its proposed Antelope Valley center, it also sought equipment financing from DCC. However, DCC refused to accept a loan application directly from L.A. Land and instead directed it to process the application through Brunswick. L.A. Land began attempting to arrange the financing through Brunswick sometime about April 1988.

Previous to the key events at issue in this case, L.A. Land opened a bowling center in San Dimas, California. It purchased the equipment for that center from Brunswick, financed the purchase through DCC, and contracted with Timberlake Construction Company ("Timberlake") to build the center. L.A. Land asked Timberlake to build its proposed center in the Antelope Valley, but Timberlake declined, citing a policy of not building in Brunswick market areas (i.e., areas where Brunswick owned and operated bowling centers.) As of 1988, Timberlake had for some time built all of Brunswick's new U.S. bowling centers.

By August of 1988 (and possibly earlier), Brunswick decided to go ahead with plans to build a new bowling center in the Antelope Valley. Brunswick had forwarded L.A. Land's equipment financing application to DCC at the end of July 1988. L.A. Land alleges that Brunswick

delayed transmittal of the application so that Brunswick could get a head start on the construction of its own new bowling center in the Antelope Valley. Ultimately, DCC turned down L.A. Land's financing application, Brunswick built a new bowling center in the Antelope Valley, and L.A. Land did not.

L.A. Land commenced this action on August 30, 1988, and immediately requested a temporary restraining order to enjoin Brunswick's construction of its new center arguing that "the market can adequately bear just one more bowling center"; the district court denied the request. At trial, L.A. Land contended that Brunswick committed three acts which violated federal antitrust law and constituted torts under California law: (1) Brunswick delayed transmission of L.A. Land's financial information to DCC; (2) Brunswick submitted to DCC an inaccurate market survey; and (3) Brunswick restricted Timberlake from building a bowling center in the Antelope Valley for L.A. Land.

Brunswick moved for a directed verdict after L.A. Land presented its case in chief and at the end of trial. The district court denied those motions and sent the case to the jury, which rendered a verdict in favor of L.A. Land. The court also denied Brunswick's motion for judgment notwithstanding the verdict, and entered a judgment awarding L.A. Land the trebled sum of $15,168,000 on the antitrust claim or, alternatively, $5,056,000 on the tort claim, and $1,435,974.80 in attorneys' fees and costs. This appeal of that judgment followed.

II. STANDARD OF REVIEW

The standard for determining the propriety of a directed verdict or a judgment notwithstanding the verdict is the same for district and appellate courts: "whether, viewing the evidence as a whole, there is substantial evidence present that could support a finding . . . for the

nonmoving party." *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 992 (9th Cir.1986) (internal quotation omitted), *cert. denied*, 479 U.S. 1031, 107 S.Ct. 876, 93 L.Ed.2d 830 (1987). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (internal quotation omitted).

In deciding this appeal from the denial of motions for directed verdict and judgment notwithstanding the verdict, we "review the evidence on [the] factual issues in the light most favorable to [L.A. Land] and draw all reasonable inferences in its favor." *Oahu Gas Service, Inc. v. Pacific Resources Inc.*, 838 F.2d 360, 364 (9th Cir.), *cert. denied*, 488 U.S. 870, 109 S.Ct. 180, 102 L.Ed.2d 149 (1988). The question whether a party possesses monopoly power is essentially one of fact. *Id.* at 363. However, the question whether specific conduct is anticompetitive in violation of the Sherman Act is one of law which we therefore review de novo. *Id.* at 368. Likewise, we review de novo the question whether specific conduct constitutes a tort under California law. *Salve Regina College v. Russell*, 499 U.S. 225, 231-32, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991) (a court of appeals should review de novo a district court's determination of state law).

III. DISCUSSION

A. Antitrust Claim

In a nutshell, L.A. Land's antitrust theory is that Brunswick monopolized the market for retail bowling services in Palmdale, and committed three specific acts in order to exclude L.A. Land from that market and thereby maintain its monopoly. At trial, L.A. Land had to prove three elements in order to establish a Sherman Act § 2 violation on its theory: (1) possession of monopoly power in the relevant market; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury.

Pacific Express, Inc. v. United Airlines, Inc., 959 F.2d 814, 817 (9th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 814, 121 L.Ed.2d 686 (1992); *Universal Analytics v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1257 (9th Cir.1990). The relevant product and geographic markets were conclusively defined before trial as retail bowling services in the Antelope Valley and are not contested; otherwise, all three elements are disputed in this appeal.

We begin and end our inquiry with the question whether the record supports the jury's finding on the first element, i.e., that Brunswick possessed monopoly power in the relevant market.[1] We believe L.A. Land's whole antitrust claim founders on this issue. The definition of monopoly power is clearly established in the case law: "Monopoly power is the power to control prices or exclude competition." *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956). Viewing the evidence in the light most favorable to L.A. Land, the record simply does not support a finding that Brunswick had power to control prices or exclude competition.

Brunswick contends that, in order to prove monopoly power, L.A. Land relied solely on the fact that Brunswick owned the only existing retail bowling center in the Antelope Valley during the relevant time period. Brunswick argues that proof of its 100% market share does not demonstrate that it had the power to control prices or exclude competition in the absence of any evidence that it could prevent entry of other market participants. Case law supports this argument. *See Oahu*, 838 F.2d at 366 ("A high market share, though it may ordinarily raise

[1] L.A. Land contends that Brunswick failed to dispute the sufficiency of the evidence to support a finding of monopoly power in its motion for directed verdict, and therefore waived the right to raise this challenge on appeal. This contention is clearly spurious, as L.A. Land itself noted in court that Brunswick raised the question of market power in its argument on the directed verdict motion. R.T. at 1843.

an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.") (internal citation omitted); *United States v. Syufy Enters.*, 903 F.2d 659, 664 & n. 6, 671 (9th Cir.1990).

L.A. Land responds with several arguments. First, L.A. Land points out that the evidence presented to the jury showed that Brunswick's share of the relevant market increased over time until it reached 100%. Brunswick's market share increased because two competitors withdrew from the market. One bowling center closed in 1979 after a fire, and the other, a 10-lane bowling center in Lancaster, closed in Spring 1988. Neither case which L.A. Land cites supports its assertion that the jury could properly rely on this evidence of withdrawals from the market to infer that Brunswick possessed monopoly power.[2] One, *Oahu,* 838 F.2d at 366, does not discuss withdrawal; the other, *Greyhound Computer Corp. v. International Business Machines,* 559 F.2d 488, 497 (9th Cir.1977), *cert. denied,* 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978), states that the fact that "[t]wo substantial competitors who met IBM in the marketplace . . . bowed out after sustaining heavy losses" helped support an inference of IBM's market dominance. In this case, however, L.A. Land does not suggest (and directs the court to no evidence which suggests) that the withdrawal of Brunswick's two competitors was in any way attributable to Brunswick's competitive conduct or any market conditions. Indeed, the evidence does not reveal any reason for their departures from the market,

---

[2] The jury instruction concerning monopoly power, to which Brunswick apparently did not object, did permit the jury to consider the departure of companies from the market as an indication of Brunswick's monopoly power. However, on review of a denial of a JNOV motion, this court applies the law truly controlling the case, regardless of the jury instructions. *Air-Sea Forwarders, Inc. v. Air Asia Co., Ltd.,* 880 F.2d 176, 182-83 & n. 5 (9th Cir.1989), *cert. denied,* 493 U.S. 1058, 110 S.Ct. 868, 107 L.Ed.2d 952 (1990).

other than that one of the competitors chose not to reopen after a fire. Thus, we do not see how this evidence could support a finding of monopoly power.

Second, L.A. Land contends that the evidence showed that Brunswick charged monopoly prices. However, it points to no actual evidence of supracompetitive pricing, and the record reveals none. L.A. Land does point out that the prices Brunswick charged at the Sands Bowl (the single bowling center in the market before L.A. Land sought to enter) were "comparable" to prices Brunswick charged at bowling centers which were in better condition and which had automatic scorers. But L.A. Land cites no authority, and we are aware of none, which supports the notion that "comparable" prices may be considered supracompetitive, even considering some difference in quality.

The only other pricing evidence to which L.A. Land points concerns the fact that the average price [3] Brunswick charged at Vista Lanes (the bowling center it built in Palmdale after L.A. Land failed to enter the market) during the first 11 months of operation was higher than the prices it charged at any other center during that time. However, considering the record as a whole, this evidence does not support an inference of monopoly pricing. Testimony at trial, apparently uncontradicted, established that at least by the time of trial Vista's prices were lower than some and higher than others in the greater Los Angeles area, and indeed lower than the prices L.A. Land charged at its bowling center in San Dimas. Thus, the record does not support a conclusion that Brunswick had the power to control prices in the relevant market.

Third, L.A. Land asserts that the evidence established that Brunswick successfully excluded all competitors from the relevant market. We note that in order to prove

---

[3] Average price is a composite of all the different prices charged in a bowling center and does not represent the actual price paid by any consumer.

Brunswick's possession of monopoly power, it was incumbent on L.A. Land to show that Brunswick had the power to exclude *competition* from the relevant market generally, not just to exclude a particular *competitor.* Courts have consistently confirmed that the goal of the antitrust laws is to protect competition rather than competitors. *See Spectrum Sports, Inc. v. McQuillan,* —— U.S. ——, ——, 113 S.Ct. 884, 892, 122 L.Ed.2d 247 (1993) (the Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself"); *Syufy,* 903 F.2d at 668 ("It can't be said often enough that the antitrust laws protect competition, *not* competitors.") (emphasis in original); *Oahu,* 838 F.2d at 370 ("The goal of the antitrust laws . . . unlike that of business tort or unfair competition laws, is to safeguard general competitive conditions, rather than to protect specific competitors."); *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.,* 627 F.2d 919, 927 (9th Cir.1980) ("Of course, it is free and open competition that the Sherman Act protects, and not any right of one competitor to be free of rough treatment at the hands of another."), *cert. denied,* 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981). A key problem in this case is that rather than adducing evidence of Brunswick's ability to impair competition generally (such as evidence that Brunswick could prevent competitor access to necessary supplies from any provider), L.A. Land focussed primarily on proving particular anticompetitive acts. But a plaintiff can not establish a monopolization offense by a firm without market power solely on the basis of undesirable or even significantly anticompetitive behavior. 3 Areeda & Turner, *Antitrust Law* ¶ 810 at 296 (1978).

The only evidence of power to exclude competition to which L.A. Land directs our attention concerns particular anticompetitive acts aimed at Harold Gelber in 1985, and others aimed at L.A. Land itself. The latter acts are the subject of this litigation; though these acts

may arguably have been unjustifiable, it is not possible to ascertain whether they are related to the maintenance of monopoly power and therefore "exclusionary" in the antitrust sense without proof of market power. *See id.* ¶ 813 at 301. In other words, evidence of these acts does not prove power to exclude competition. Assuming without deciding that the record fully supports findings that, as L.A. Land sought to prove at trial, Brunswick prepared a false or misleading market survey, delayed transmittal to DCC of L.A. Land's financing application, and prevailed upon Timberlake not to contract with L.A. Land, these findings only support the conclusion that Brunswick committed anticompetitive acts. Whether those acts maintained a Brunswick monopoly is a question which logically requires some other proof of monopoly power. If this assessment were not correct then "possession of monopoly power" and "willful acquisition or maintenance of that power," *Pacific Express,* 959 F.2d at 817, would not be separate elements of a section 2 claim; rather, the latter would prove the former.

As to the Gelber evidence, even accepting L.A. Land's description of the evidence as accurate, it establishes no more than that Brunswick dissuaded Gelber from entering the market by threatening to compete (that is, by indicating that it intended to open a second bowling center in the market.) L.A. Land does not suggest that Brunswick set up any actual barriers to Gelber's entry into the market. *See Syufy,* 903 F.2d at 668 (a strong competitor's ability to deter entry by others is not a "structural barrier to entry"). Evidence of threatened competition can not rationally support an inference of power to exclude competition, particularly where a court has already determined that the acts in question were not exclusionary —Gelber brought an antitrust suit based on these events and lost. Thus, this evidence does not support a finding of monopoly power.

Finally, L.A. Land contends it proved that substantial barriers to entry existed in the relevant market. It argues

that evidence of "Brunswick's systematic campaign to exclude competitors, such as L.A. Land and Gelber" readily supports a jury finding of high barriers to entry. We reject this argument for the simple reason that anticompetitive conduct by one firm against another is not an "entry barrier." Barriers to entry may be defined as either "additional long-run costs that were not incurred by inincumbent firms but must be incurred by new entrants," or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." Areeda & Hovenkamp, *Antitrust Law* ¶ 409 at 509-10 (1992 Supp.) (internal quotation omitted).[4] The evidence of Brunswick's behavior toward L.A. Land and Gelber fits neither definition.

L.A. Land also argues that the difficulty of obtaining financing for a new center's bowling equipment is a barrier to entry. This is a more serious proposition. There is some evidence in the record that lenders generally have trepidations about financing bowling equipment purchases. Though there was also evidence that some 19 different lenders have financed purchases of Brunswick equipment since 1986, the jury was entitled to find that bowling equipment financing is hard to obtain. However, the jury could not rationally construe this factor as a barrier to entry, as there was no evidence that the lenders who were willing to finance bowling equipment imposed higher financing costs on new entrants than on established firms. *See* note 4. The fact that many lenders do not understand the bowling market does not mean that the capital costs for new entrants and incumbents in the market dif-

[4] The main sources of entry barriers are: (1) legal license; (2) control over an essential or superior resource; (3) entrenched buyer preferences for established brands or company reputations; and (4) capital market evaluations imposing higher capital costs on new entrants. Economies of scale may also be considered an entry barrier in some situations. 2 Areeda & Turner, *Antitrust Law* ¶ 409b at 299-300 (1978). L.A. Land points to no evidence which fits in any of these categories.

fer, or that it is any more difficult for new entrants to obtain financing than incumbents. *Cf. Morgan, Strand, Wheeler & Biggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir.1991) (a jury could not reasonably find cost of equipping a physician's office to be a significant entry barrier where evidence does not permit comparing that cost to potential competitors' resources or expected returns). The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier. *See* 2 Areeda & Turner, *Antitrust Law* ¶ 409e at 303 ("The mere fact that entry requires a large absolute expenditure of funds does not constitute a 'barrier to entry'; a new entrant is disadvantaged only to the extent that he must pay more to attract those funds than would an established firm."). Thus, the record does not support a finding of significant entry barriers.

The fundamental problem in this case is that L.A. Land pursued a flawed theory which the district court should not have sent to the jury. L.A. Land's antitrust theory was a source of considerable confusion and controversy throughout this litigation in the district court. Early on in the case, L.A. Land chose *not* to allege that Brunswick monopolized the market for bowling equipment—that is, L.A. Land specifically eschewed a supply monopoly theory; consequently, it was precluded from obtaining discovery on that theory. Throughout the litigation, the question surfaced whether L.A. Land could prove its case without showing monopolistic control over the supply of equipment and access to lenders and builders. The district court on several occasions expressed its doubt about L.A. Land's theory,[5] but sent it to the jury

[5] In its February 27, 1989 order denying Brunswick's first motion for summary judgment, the court stated the following:

> On the present record, plaintiffs have not met their burden of submitting sufficient evidence to make out a prima facie case for all the elements of the alleged antitrust offenses. Nevertheless, the Court believes that plaintiffs should have more time to engage in discovery to support their claims. . . .

nonetheless. For example, in denying Brunswick's mid-trial directed verdict motion, the court stated:

> I have decided to deny the motion. However, in denying the motion, I do not want to indicate that I think there is not any merit in what the defendants say. I think that there is enough to go to the jury, but I must tell you, Mr. Disner, that there are a couple of things in there that bother me tremendously and what bothers me is that . . . because there were other lenders and there were other builders available, you just wonder if they couldn't have gone to those builders or those lenders, and that has been a problem all during the time we were arguing the motion.

R.T. at 1648.

In the factual circumstances of this case, a rational jury could not conclude that Brunswick possessed the power to exclude competition from the relevant market without hearing evidence that Brunswick had monopoly control of the equipment market. *Cf. Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir.1989).[6] L.A. Land never alleged that Bruns-

---

The Court cautions plaintiffs, however, that the theory of their case is confused and problematic.

Despite plaintiffs' insistence that the Brunswick market study is patently false, because the survey states that Palmdale can support only one new center, plaintiffs themselves argued to this Court during a prior hearing that Palmdale could only add one new center. Moreover, plaintiffs must offer proof that Brunswick's position as a manufacturer of bowling equipment gives Brunswick control of the many banks from which plaintiffs could receive financing. There is already some evidence that Brunswick has no such power in the financial markets.

Because L.A. Land rejected a supply monopoly theory, it apparently never did offer proof that Brunswick, as a supplier, controlled all sources of financing.

[6] In *Indiana Grocery*, the court observed that "[t]he output of the Indianapolis retail grocery market is, of course, groceries, *and Indiana Grocery concedes that Kroger could never control the sup-*

wick had power to exclude from the market a potential competitor that chose to purchase equipment from a company other than Brunswick, nor did it prove that other suppliers did not exist.[7] A supply monopoly theory, if it could be substantiated, logically would have led to proof of Brunswick's power to exclude competition in the retail bowling market. The theory which L.A. Land did pursue, however, apparently led it to focus on proof of particular anticompetitive acts and leave unsatisfied the requirement that it show Brunswick possessed the power to control prices or exclude competition. Consequently, because the evidence does not support a finding of monopoly power, the antitrust claim must fail. *See Syufy*, 903 F.2d at 671 n. 21 (plaintiff can not prevail on section 2 claim without proof of defendant's power to exclude competition).

B. Tort Claims

L.A. Land's tort claims were based on Brunswick's alleged interference in L.A. Land's business relationships with DCC and Timberlake. In order to succeed at trial on its claims of tortious interference with prospective economic advantage, L.A. Land had to prove these elements: (1) an economic relationship containing the probability of future economic benefit to L.A. Land; (2)

---

ply of groceries in the Indianapolis retail market. If so, it is very difficult to see how Kroger could ever restrict total market output and thereby raise prices." *Id.* (emphasis in original). The court further noted that "while market share may indicate market power in certain cases, the two are not necessarily the same. Market share indicates market power only when sales reflect control of the productive assets in the business, for only then does it reflect an ability to curtail total market output." *Id.* By failing to prove a supply monopoly. L.A. Land essentially failed to prove that Brunswick controlled access to the productive assets of the retail bowling services market.

[7] The jury could have inferred from the evidence presented, however, that Brunswick was a desirable supplier at the relevant time.

knowledge by Brunswick of the existence of the relationship; (3) intentional acts on the part of Brunswick designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages to L.A. Land proximately caused by Brunswick's acts. *Buckaloo v. Johnson*, 14 Cal.3d 815, 122 Cal. Rptr. 745, 752, 537 P.2d 865, 872 (1975).

The jury specifically answered in the affirmative the question whether Brunswick "intentionally and improperly interfere[d], without justification or privilege, with any prospective economic advantage of" L.A. Land. The jury further replied affirmatively to the question whether "any such act of interference proximately cause[d] damage" to L.A. Land. Because the form of verdict did not distinguish between Brunswick's alleged interference in L.A. Land's relationship with DCC and in its relationship with Timberlake, we consider both claims.

1. L.A. Land-DCC Relationship.

Brunswick argues that, as a matter of law, L.A. Land's allegations fail to support a tort claim because Brunswick was not a stranger to the relationship between L.A. Land and DCC, and indeed had a financial stake in that relationship. Brunswick contends, relying on *Gianelli Distributing Co. v. Beck & Co.*, 172 Cal.App.3d 1020, 219 Cal. Rptr. 203, 221 (1985), that evidence in the record must support a finding of an independent economic relationship between L.A. Land and DCC. Brunswick correctly asserts that evidence in the record instead shows that, because of its agreement with DCC, Brunswick was a necessary party to the prospective relationship between DCC and L.A. Land. *See, e.g.*, R.T. at 2275 (testimony by DCC official: "We weren't willing to make loans on new centers without some form of recourse guarantee[] from Brunswick so we wouldn't have made any of these loans without it."); R.T. at 2263 (testimony that DCC required Brunswick to prepare loan

application packages for potential purchasers); R.T. at 2276 (testimony that DCC required Brunswick to prepare market surveys as part of loan packages because of Brunswick's superior knowledge of bowling industry).

L.A. Land does not point to any evidence which indicates an independent relationship between itself and DCC, or which contradicts evidence that DCC would not be in the business of financing equipment purchases by Brunswick's customers without Brunswick's financial participation and information-gathering. Instead, L.A. Land counters Brunswick's argument by asserting that Brunswick's defense that its interference was justified by its repurchase obligations under the DCC-Brunswick agreement is pretextual because there was no evidence that any perceived risks motivated Brunswick to discourage DCC from lending to L.A. Land. Apparently, L.A. Land fails to see that the issue is not Brunswick's motivation for interference as a matter of fact, but whether the tort claim falls as a matter of law because Brunswick was not a third party to the prospective relationship between L.A. Land and DCC. Brunswick could not have "interfered" if there was no independent economic relationship between DCC and L.A. Land in which to interfere. *See Kruse v. Bank of America*, 202 Cal.App.3d 38, 248 Cal.Rptr. 217, 234 (1988) ("The tort of intentional interference with economic advantage affords a remedy for wrongful interference with an economic relationship by a *third party*.") (emphasis in original), *cert. denied*, 488 U.S. 1043, 109 S.Ct. 869, 102 L.Ed.2d 993 (1989).[8] Thus, we conclude that Brunswick has the better argument on this issue.

---

[8] Contrary to an assertion by L.A. Land in this appeal, Brunswick's reliance on *Kruse* does not mean that its argument rests on the premise that it and DCC were "identical." Given the evidence in the record that Brunswick was not a disinterested "third party" to the relationship between L.A. Land and DCC, *Kruse* merely supports the proposition that L.A. Land's allegations do not state a tort claim as a matter of law because Brunswick was not a third party.

L.A. Land also contends that Brunswick's argument is "moot" because Brunswick did not request the jury to be instructed on the issue of L.A. Land's independent relationship with DCC. L.A. Land cites no authority for this proposition, and we reject it on the basis of *Air-Sea Forwarders,* which holds that the truly applicable law rather than the jury instructions governs review of a denial of a directed verdict or judgment notwithstanding the verdict. 880 F.2d at 182-83 & n. 5. Finally, L.A. Land argues that Brunswick's defense does not apply because the jury implicitly found malicious conduct by awarding one dollar in punitive damages. The only authority which L.A. Land provides to support this contention is a "Cf." citation to a case, *Lowell v. Mother's Cake & Cookie Co.,* 79 Cal.App.3d 13, 144 Cal.Rptr. 664 (1978), which does not support its proposition either directly or inferentially. We are aware of no other authority which supports L.A. Land's argument.

2. L.A. Land-Timberlake Relationship.

Brunswick argues that because it and L.A. Land were competitors for the services of bowling center builders, the "privilege of competition" protects it from liability for the pressure it applied on Timberlake not to build for L.A. Land. *See Buckaloo,* 122 Cal.Rptr. at 752, 537 P.2d at 872 ("Perhaps the most significant privilege or justification for interference with a prospective business advantage is free competition."). Assuming without deciding that the record supports a finding that Brunswick prevailed upon Timberlake not to deal with its competitor, a number of authorities establish that Brunswick had the right under state law to do so.

In *A-Mark Coin Co. v. General Mills, Inc.,* 148 Cal. App.3d 312, 195 Cal.Rptr. 859, 867 (1983), the court held that a firm's interference with another's prospective economic relation falls within the privilege of competiton as long as: (1) the relation concerns a matter involved

in the competition between the firm and the other; (2) the firm does not employ wrongful means; (3) the firm's action does not create or continue an unlawful restraint of trade; and (4) the firm's purpose is "at least in part" to advance its interest in competing with the other. *Id.* (quoting Restatement (Second) of Torts § 768.) This court confirmed in *Pacific Express* that a firm's motive need only stem *in part* from a genuine competitive purpose. 959 F.2d at 819-20. Because the record shows that L.A. Land's contractual relations with Timberlake were "merely contemplated or potential," Brunswick was free to "refuse to deal with third parties [e.g., Timberlake] unless they cease dealing with" L.A. Land. *A-Mark Coin,* 195 Cal.Rptr. at 867 (internal quotation omitted); *see New Kids on the Block v. News America Publishing, Inc.,* 971 F.2d 302, 310 (9th Cir.1992). L.A. Land points to no evidence in the record that shows Brunswick's sole motive in wedging itself between L.A. Land and Timberlake, if it did so at all, was other than to advance its own economic interest, or that otherwise suggests that the conditions for the privilege outlined above did not exist.[9]

In addition, L.A. Land's proposition is belied by the facts of *A-Mark Coin,* which did not involve competition for a customer, but rather for a particular good. In that case, the court held that the privilege of competition protected the actions of a successful bidder for a coin collection against an allegation by the unsuccessful bidder of intentional interference with prospective economic advantage. *A-Mark Coin,* 195 Cal.Rptr. at 861-64. Thus, Brunswick's conduct with respect to Timberlake is privileged.

---

[9] An exception is that L.A. Land does assert (presumably relying on evidence pertaining to the antitrust claim) that the interference here created an unlawful restraint of trade. Because we reverse the district court's judgment on the antitrust claim, no basis for this assertion remains.

IV. CONCLUSION

We conclude that the evidence regarding the antitrust claim does not support a finding that Brunswick possessed monopoly power. We further conclude that L.A. Land's claim that Brunswick interfered with its prospective relationship with DCC fails as a matter of law because Brunswick was not a stranger to that relationship. Also, the privilege of competition protected Brunswick's conduct with respect to the prospective relationship between L.A. Land and Timberlake. Therefore, we reverse the district court's judgment and remand with directions to enter judgment in favor of Brunswick on L.A. Land's claims of both monopolization and tort. Consequently, we deny L.A. Land's request for attorneys' fees on appeal.

U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 88-5285 MRP

LOS ANGELES LAND CO., *et al.*

v.

BRUNSWICK CORP., *et al.*

Filed December 23, 1991

For plaintiffs: Eliot G. Disner and Beverly Tillett Pine, of Shapiro, Posell & Close, Los Angeles, Cal. For defendants: Richard J. Favretto, Roy T. Englert and Robert J. Kriss, of Mayer, Brown & Platt, Washington, D.C., and Chicago, Ill.

Order

PFAELZER, D.J.: The Court, having read and considered the post-trial motions of the parties, having heard oral argument by counsel, and having taken the motions under submission on August 12, 1991, now rules on these motions as follows:

1. With respect to defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, or Remittitur, Judgment Notwithstanding the Verdict is granted as to the state law claims of breach of contract and wrongful denial of contract. With respect to the claims for violation of § 1 [sic] of the Sherman Act and for intentional interference with prospective economic advantage, the motions are denied.

2. Plaintiff's Motion for Injunctive Relief under 15 U.S.C. § 26 is denied.

3. Plaintiff's Motion for an Order and Judgment Finding that Defendant Brunswick Corporation Violated the California Unfair Competition Statutes and for Injunctive Relief is denied.

4. Plaintiff's Motion for Award of Attorney's Fees, Expenses and Costs is granted as follows:

a. The Court awards the sum of $1,282,501.50 attorney's fees, based upon the following findings:

1. Having taken into consideration the factors articulated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, *sub nom.* and *Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976), the Court makes several findings, the key finding being that this was neither a novel nor a particularly difficult case. The case did not require exceptional skill, although in fact it was tried with a high degree of competence by counsel whose experience, reputation, and ability are well known to the Court. The Court cannot conclude that the case was particularly undesirable or that it would have been more than normally difficult to find counsel who would accept the case.

2. The Court does not find it appropriate to grant attorney's fees for the services of Ronald F. Greenspan who was the only officer in the plaintiff company who knew anything at all about the case. Without his testimony as a percipient witness, there would have been no case on any theory. Thus, although Mr. Greenspan is a member of the bar, it is clear he did not act as counsel in this case. Accordingly, the Court deducts $79,740.00 for fees sought on account of Mr. Greenspan and finds that the remaining hours spent and the hourly rate for each attorney are reasonable for the work done.

3. The Court further finds that there should be no adjustment for the increase in hourly rates during the time

the case was pending and that no multiplier should be applied, the award being adequate to compensate plaintiff's counsel for the services rendered in this case. No reduction is made for the failure of plaintiff to prevail on the motion to disqualify counsel, as plaintiff did partially succeed on that motion, nor for the hours spent to prove the state law claims. The hours spent to prove the Sherman Act claim necessarily included those required to prove the state law claims. Proof of the federal claim is essentially the proof required to prove the state claims. Accordingly, the Court finds that the fees solely related to the successful interference claim are *de minimis*. However, plaintiffs have acquiesced to a reduction of their fees by $48,632.10, which should be more than sufficient to treat this problem if there is one. Therefore, the Court further deducts the sum of $48,632.10 from fees sought.

b. The Court awards additional costs of suit in the sum of $106,694.00.

c. The Court awards taxable costs in the sum of $46,779.33.

5. In accordance with the above rulings, the Court orders that an Amended Judgment in the form of Exhibit A attached hereto be entered on the tenth day following entry of this Order and that Stay of Execution of Judgment entered by the Court on May 13, 1991 is hereby ordered terminated ten business days from the date of entry hereof.

THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 88-05285 MRP (GHKx)

LOS ANGELES LAND COMPANY, a California corporation; SIERRA PALM PARTNERS, A CALIFORNIA LIMITED PARTNERSHIP; and WEST LANES, INC., a California corporation,

Plaintiffs,

vs.

BRUNSWICK CORPORATION, a Delaware corporation; LEISERV, INC., a Delaware corporation; and BRUNSWICK BOWLING & BILLIARDS CORPORATION, a Delaware corporation,

Defendants.

AMENDED JUDGMENT

Filed Dec. 23, 1991

Entered Jan. 6, 1992

This action came on for trial before the Court and a jury, the Honorable Mariana R. Pfaelzer, District Judge, presiding. The issues were duly tried and a properly constituted jury rendered its Verdict on May 3, 1991 (copy attached hereto as Exhibit 1 and incorporated herein). On May 13, 1991 this Court entered Judgment consistent therewith, which was then stayed to consider all anticipated post-trial motions. On December 11, 1991 the Court ruled on said post-trial motions (copy of Civil Minutes attached hereto as Exhibit 2 and incorporated herein). Accordingly, IT IS HEREBY ORDERED AND ADJUDGED:

1. Under Section 2 of the Sherman Act (15 U.S.C. § 2) for unlawful monopolization, plaintiff Los Angeles Land Company shall recover from the defendant Brunswick Corporation:

a. the sum of $5,056,000; said sum to be trebled to $15,168,000 (pursuant to 15 U.S.C. § 15), plus interest thereon at an annual rate of 6.04 percent, to be calculated daily from May 13, 1991, compounded annually to the date of payment, until said sum has been paid in full (pursuant to 28 U.S.C. § 1961);

b. plaintiff's reasonable attorneys fees in the amount of $1,282,501.50 (pursuant to 15 U.S.C. § 15);

c. plaintiff's additional costs of suit in the sum of $106,694.00 (pursuant to 15 U.S.C. § 15);

d. plaintiff's taxable costs in the sum of $46,779.33 (pursuant to 28 U.S.C. § 1920); and

e. interest on the sum of $1,435,974.80 (the total of subparts 1(b)-(d)) at an annual rate of 6.04 percent, to be calculated daily from the date of entry hereof, compounded annually to the date of payment, until said sum has been paid in full (pursuant to 28 U.S.C. § 1961).

2. In the alternative, under California law for intentional interference with prospective economic advantage, plaintiff Los Angeles Land Company shall recover from the defendant Brunswick Corporation:

a. the sum of $5,056,000;

b. punitive damages in the sum of $1.00;

c. interest thereon at an annual rate of 6.04 percent, to be calculated daily from May 13, 1991, compounded annually to the date of payment, until said sum has been paid in full, pursuant to 28 U.S.C. § 1961.

IT IS SO ORDERED.

/s/ Mariana R. Pfaelzer
Judge

DATED: December 22, 1991

Submitted by:

/s/ Eliot G. Disner
One of Plaintiffs' Attorneys
ELIOT G. DISNER, ESQ.
BEVERLY TILLETT PINE, ESQ.
SHAPIRO, POSELL & CLOSE
2029 Century Park East
Suite 2600
Los Angeles, California 90067
(310) 277-1818

Dated: 12/19/91

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 88-05285 MRP

LOS ANGELES LAND COMPANY, a California corporation; SIERRA PALM PARTNERS, a California limited partnership; a WEST LANES, INC., a California corporation,

Plaintiffs,

vs.

BRUNSWICK CORPORATION, a Delaware corporation; LEISERV, INC., a Delaware corporation; and BRUNSWICK BOWLING & BILLIARDS CORPORATION; a Delaware Corporation,

Defendants.

VERDICT

[Filed May 3, 1991]

We have considered the evidence presented in this case, have listened to and obeyed the Instructions of the Court as to the appropriate law to be applied, and now enter our Verdict. In accordance with those Instructions, we find the following as to plaintiffs Los Angeles Land Company (L.A. Land), Sierra Palm Partners (Sierra Palm), and West Lanes, Inc. (West Lanes), and defendants Brunswick Corporation (Brunswick Corporation), Leiserv, Inc. (BRC), and Brunswick Bowling & Billiards Corporation (Brunswick Division or BBBC).

I. FEDERAL LAW—MONOPOLIZATION

(Please answer each subpart "yes" or "no," or fill in amount, if any, as may be appropriate)

A. Did the defendants have monopoly power in the relevant market?

yes.

B. If so, did any of the defendants willfully maintain that power through restrictive or exclusionary conduct, as opposed to legitimate competitive behavior?

yes.

C. Did the defendants' activities occur in or affect interstate commerce?

yes.

D. Was any plaintiff injured in its business or property because of any defendant's restrictive or exclusionary conduct?

yes.

(If *any* of your answers to I. A, B, C or D are "no," proceed to Part II. If *all* of your answers to I. A, B, C and D are "yes," proceed to I. E)

E. If your answer to I. is "yes," which defendant or defendants?

Brunswick Corporation	X
BRC	
Brunswick Division	

F. As to each defendant to which you answered "yes" in I. E., for what amount do you find the defendant liable to the plaintiffs?

Brunswick Corporation	$5,056,000
BRC	
Brunswick Division	

II. CALIFORNIA STATE LAW CLAIMS

(Please answer each subpart "yes" or "no," or fill in amount, if any, as may be appropriate)

A. INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

1. Did any defendant intentionally and improperly interfere, without justification or privilege, with any prospective economic advantage of any plaintiff?

   yes.

(If your answer to II. A. 1 is "no," proceed to II. B.; if your answer to II. A 1 is "yes," proceed to II. A. 2)

2. Did any such act of interference proximately cause damage to one or more plaintiffs?

   yes.

(If your answer to II. A. 2 is "no," proceed to II. B.; if your answer to II. A. 2 is "yes," proceed to II. A.3).

3. If you answer to II. A. 2 is "yes," which defendant or defendants proximately caused damage to plaintiffs?

   Brunswick Corporation X

   BRC _____

   Brunswick Division _____

4. As to each defendant you identified in response to II. A. 3, for what amount do you find the defendant liable to the plaintiffs?

   Brunswick Corporation $5,056,000

   BRC _____

   Brunswick Division _____

5. As to each defendant from which you awarded damages in II. A. 4, do you find by clear and convincing evidence that the acts of interference were done willfully, maliciously, despicably, and with the intent to injure one or more plaintiffs?

   yes.

(If your ansewer to II. A. 5 is "no," proceed to II. B; if your answer to II. A. 5 is "yes," you may then consider whether you should award punitive damages, and if you choose to do so, proceed to II. A. 6)

6. If you answer to II. A. 5 was "yes" as to any defendant, what amount of punitive damages, if any, do you choose to award from that defendant to plaintiffs?

   Brunswick Corporation $1.00

   BRC _____

   Brunswick Division _____

B. BREACH OF CONTRACT

(Please answer each subpart "yes" or "no," or fill in amount, if any, as may be appropriate)

1. Did West Lanes enter into a contract with the Brunswick Corporation or the Brunswick Division for the purchase of bowling equipment for Palmdale?

   yes.

2. Did West Lanes fully perform all of its obligations under the contract?

   yes.

3. Were all conditions precedent to the contract fulfilled by West Lanes?

   yes.

(If *any* of your answers to II. B. 1, 2 and 3 are "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If *all* of your answers to II. B. 1, 2 and 3 are "yes," proceed to II. B. 4)

4. Did the Brunswick Corporation or the Brunswick Division refuse to perform under the contract?

   yes.

(If your answer to II. B. 4 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. B. 4 is "yes," proceed to II. B. 5)

5. Was West Lanes proximately damaged as a result of such failure of the Brunswick Corporation or the Brunswick Division to perform under the contract?

   yes

(If your answer to II. B. 5 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. B. 5 is "yes," proceed to II. B. 6)

6. If your answer to II. B. 5 was "yes," identify which defendant or defendants whose failure to perform was the proximate cause of damage to West Lanes?

   Brunswick Corporation X

   Brunswick Division _____

7. As to each defendant you identified in response to II. B. 6, for what amount do you find the defendant liable to West Lanes?

   $5,056,000.

C. WRONGFUL DENIAL OF CONTRACT

(Please answer each subpart "yes" or "no," or fill in amount, if any, as may be appropriate)

1. If *all* of your answers to II. B. 1, 2, 3 and 4 are "yes," did the Brunswick Corporation or the Brunswick Division deny, in bad faith without probable cause, justification or privilege, and with no belief in the existence of a defense, the existence of a legally binding and enforceable contract between them and West Lanes?

   yes

(If your answer to II. C. 1 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. C. 1 is "yes," proceed to II. C. 2)

2. If your answer to II. C. 1 was "yes," was West Lanes proximately damaged as a result of such bad faith denial of contract?

   yes

(If your answer to II. C. 2 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. C. 2 is "yes," proceed to II. C. 3)

3. If your answer to II. C. 2 was "yes," identify which defendant or defendants whose bad faith denial of contract was the proximate cause of damage to West Lanes?

   Brunswick Corporation X

   Brunswick Division _____

4. As to each defendant you identified in response to II. C. 3, for what amount do you find the defendant liable to West Lanes?

   Brunswick Corporation $5,056,000.00

   Brunswick Division _____

5. As to each defendant from which you awarded damages in II. C. 4, do you find by clear and convincing evidence that the acts of interference were done willfully, maliciously, despicably, and with the intent to injure one or more plaintiffs?

   yes.

(If your answer to II. C. 5 is "no," you have completed your deliberations and you should proceed no further. The foreperson should sign this Verdict form in the space provided on page 11. If your answer to II. C. 5 is "yes," you may then consider whether you should award punitive damages, and if you choose to do so, proceed to II. C. 6)

6. If your answer to II. C. 5 was "yes" as to any defendant, what amount of punitive damages, if any, do you choose to award from that defendant to plaintiffs?

   Brunswick Corporation $1.00

   Brunswick Division _____

We have unanimously and voluntarily agreed to this Verdict.

DATED: 5/3/91

/s/ Geraldine Mays
Foreperson

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-88-5285-MRP

HON. MARIANA R. PFAELZER, Judge

LOS ANGELES LAND CO., *et al.*

vs.

BRUNSWICK CORP., *et al.*

CIVIL MINUTES—GENERAL

Date 12/11/91

PROCEEDINGS:

The Court, having read and considered the post-trial motions of the parties and heard oral argument on them, took the motions under submission on August 12, 1991. The Court now rules on these motions.

1. Defendant's Motion for Judgment Notwithstanding the Verdict, New Trial, or Remittitur is granted as to the state law claims for breach of contract and wrongful denial of contract. Judgment Notwithstanding the Verdict is granted as to these two claims. In all other respects, the motion is denied.

2. Plaintiff's Motion for Injunctive Relief under 15 U.S.C. § 26 is denied.

3. Plaintiff's Motion for an Order and Judgment Finding that Defendant Brunswick Corporation Violated the

California Unfair Competition Statutes and for Injunctive Relief is denied.

4. Plaintiff's Motion for Award of Attorney's Fees, Expenses and Costs is granted as follows:

a. Having taken into consideration the factors articulated in *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), *cert. denied, sub nom. Perkins v. Screen Extras Guild, Inc.*, 425 U.S. 951 (1976), the Court makes several findings, the key finding being that this was neither a novel nor a particularly difficult case. The case did not *require* exceptional skill, although in fact it was tried with a high degree of competence by counsel whose experience, reputation, and ability are well known to the Court. The Court cannot conclude that the case was particularly undesirable or that it would have been more than normally difficult to find counsel who would accept the case. Finally, the Court does not find it appropriate to grant attorney's fees for the services of Ronald F. Greenspan who was the only officer in the plaintiff company who knew anything at all about the case. Without his testimony as a percipient witness, there would have been no case on any theory. Thus, although Mr. Greenspan is a member of the bar, it is clear he did not act as counsel in this case. Accordingly, the Court deducts $79,740.00 for fees sought on account of Mr. Greenspan and finds that the remaining hours spent and the hourly rate for each attorney are reasonable for the work done. The Court further finds that there should be no adjustment for the increase in hourly rates during the time the case was pending and that no multiplier should be applied, the award being adequate to compensate plaintiff's counsel for the services rendered in this case. No reduction is made for the failure of plaintiff to prevail on the motion to disqualify counsel as plaintiff did partially succeed on that motion, nor for the failure to succeed on some of the state law claims as plaintiffs did succeed on the claim for interference with

prospective advantage. The same efforts were necessary to prove any one of the state law claims as to prove all of them. Accordingly, the Court awards $1,146,490 in attorney's fees.

b. Out-of-pocket expenses in the amount of $98,705.06 are awarded.

c. Costs of suit in the amount of $47,198.93 are awarded.

Counsel for plaintiff is to prepare a proposed order reflecting these rulings and submit it to the Court by Monday, December 16, 1991.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-55134

D.C. No. CV-88-5285-MRP

LOS ANGELES LAND CO.; SIERRA PALM PARTNERS;
WEST LANES, INC.,
Plaintiffs-Appellees,

v.

BRUNSWICK CORPORATION,
Defendant-Appellant.

ORDER

[Filed Nov. 12, 1993]

Before: GIBSON*, HALL and KLEINFELD, Circuit Judges.

Having been reviewed by the Court, Appellee's petition for rehearing is hereby DENIED.

---

* The Honorable Floyd R. Gibson, Senior Circuit Judge for the Eighth Circuit, sitting by designation.